TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906

No. ~~318.~~ 63

FREDERIC L. GRANT SHOE COMPANY, APPELLANT,

vs.

W. M. LAIRD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

FILED JUNE 28, 1905.

(19,820.)

(19,820.)

COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 318.

GRANT SHOE COMPANY, APPELLANT,

vs.

W. M. LAIRD COMPANY.

E DISTRICT COURT OF THE UNITED STATES FOR WESTERN DISTRICT OF NEW YORK.

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E (INC.), PRINTERS, WASHINGTON, D. C., MARCH 12, 1906.

1 UNITED STATES OF AMERICA,
Western District of New York.

To Frederic L. Grant Shoe Company, of Rochester, in the county of Monroe, said district, Greeting:

For certain causes offered before the District Court of the United States of America, within and for the Western District of New York, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our said District Court to be holden at Buffalo, in said district, on the 25th day of July, A. D. 1903, to answer to a petition filed by W. M. Laird Company of Pittsburg, Pa., in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness, the Honorable John R. Hazel, Judge of said court, and the seal thereof, at the City of Buffalo, this 15th day of July, A. D. 1903.

[SEAL OF THE COURT.] GEO. P. KEATING, *Clerk.*

Notice to Defendant: It is not necessary for you to appear on the return of this subpœna. You may appear and plead to the petition at any time within five days after said return day.

[Endorsed:] No. 1502. United States District Court, Western District of New York. In Bankruptcy. In the matter of Frederic L. Grant Shoe Co. an alleged Bankrupt. Subpœna to alleged bankrupt. Filed July 23, 1903. George P. Keating, Clerk. Filed ——, 190–.

1½ Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA, *W. District of N. Y., ss:*

I hereby certify and return that I served the annexed subpœna on the therein-named Frederic L. Grant Shoe Co. by handing to and leaving a true and correct copy thereof and also duplicate petition with Frederic L. Grant, President of said Company personally at Charlotte (Ontario Beach) in said District on the 18th day of July, A. D. 1903.

WM. R. COMPTON,
U. S. Marshal,
By ROBT. D. BURNS, *Deputy.*

2 United States District Court, Western District of New York.

In Re FREDERIC L. GRANT SHOE CO., an Alleged Bankrupt.

To the Hon. John R. Hazel, Judge of the District Court of the United States for the Western District of New York:

The petition of W. M. Laird Co., of Pittsburg, Pa., respectfully shows:

First: That the above named Frederic L. Grant Shoe Co., of the City of Rochester, in said District, is a corporation duly incorporated and existing under and by virtue of the Laws of the State of New York, and having its office and principal place of business in the City of Rochester, County of Monroe and State of New York.

Second: That for the greater portion of the six months next preceding the date of the filing of this petition said Frederic L. Grant Shoe Co., has had its office and principal place of business at the City of Rochester aforesaid, in said Western District of New York, and that said organization was organized for, has been and is by occupation, a manufacturer of shoes and is engaged principally in manufacturing and mercantile pursuits.

Third: That said Frederic L. Grant Shoe Co. owes debts to the amount of $1,000 and over and is insolvent.

3 *Fourth:* That as your petitioner is informed by the president of said Frederic L. Grant Shoe Co., and verily believes, said Frederic L. Grant Shoe Co. has less than twelve creditors.

Fifth: That your petitioner is a corporation duly organized and existing under and by virtue of the Laws of the State of New Jersey, engaged in the business of buying and selling shoes and foot-wear, and having its office and principal place of business in the City of Pittsburg, State of Pennsylvania.

Sixth: That your petitioner is a creditor of said Frederic L. Grant Shoe Co., having provable claims against it amounting in the aggregate to more than $500, and that your petitioner has no security of any kind for said debt, or any part thereof, nor has your petitioner received a preference within the meaning of the bankruptcy act as amended.

Seventh: That your petitioner's claim arises from the following transactions and circumstances: On or about September 3d, 1902, and between that date and May 22d, 1903, your petitioner purchased of said Frederic L. Grant Shoe Co., at various times and in various amounts, merchandise consisting of women's shoes, said shoes to be manufactured by said Frederic L. Grant Shoe Co., for your petitioner in accordance with samples shown your petitioner at the various times that the orders therefor were given. That in pursuance of such orders so given said shoes were manufactured by said Frederic L. Grant Shoe Co. and delivered to your petitioner, said shoes so delivered aggregating several thousand pairs. That

4 your petitioner, upon receipt of said shoes from time to time, remitted and paid to said Frederic L. Grant Shoe Co. the price agreed to be paid therefor, and all of said shoes so delivered

have been fully paid for in accordance with the terms upon which the same were purchased. That prior to the purchase of any of said shoes said Frederic L. Grant Shoe Co. did, for a valuable consideration and in consideration of the purchase by your petitioner of said merchandise, expressly agree, guarantee and warrant that all shoes which they might thereafter manufacture for and sell to your petitioner, would be first-class in every particular, both as to workmanship and materials, and would give perfect satisfaction. That such express warranty was made and was a part of the transaction upon each purchase of shoes hereinbefore referred to. That said Frederic L. Grant Shoe Co. has made a breach of said express warranty, in that of the shoes sold and delivered to your petitioner as aforesaid there were, and are, 1864 pairs of women's high heeled shoes which do not give satisfaction to your petitioner or its customers and which are defective in workmanship and materials, in that the heels are not made of proper materials, the soles are not made of proper materials, the facing of the heels is not made of proper materials, and the covering of the heels is not made of proper materials, and the adhesive substance used in the manufacture of said shoes was not a proper substance to use for that purpose. That said defects were, and are, latent defects, being undiscoverable upon an examination of the shoes as they came from the factory. The result of
5 such defects is that the soles of said shoes crack and split, the leather facing of the heel peels off, and the outer covering of the heel becomes loosened and comes off, and furthermore, the wooden foundation of the heel splits and breaks, so that the shoe cannot be worn. That by reason of the facts and circumstances hereinbefore alleged, your petitioner has suffered damage in the sum of $3,732.80, which is the amount of its claim against said Frederic L. Grant Shoe Co.

Eighth: That within four months preceding the filing of this petition, and on or about May 15th, 1903, the said Frederic L. Grant Shoe Co., while insolvent, committed an act of bankruptcy, in that, as your petitioner is informed by the president of said Frederic L. Grant Shoe Co. and by one McAuliffe, an agent and representative of the German American Bank of Rochester, and verily believes, it did sell, assign, transfer and set over unto said German American Bank of Rochester, N. Y., a domestic banking corporation, all of its property of every name and nature, consisting of stock and materials on hand, machinery, tools, office furniture and fixtures, cash on hand, bills and accounts receivable and other assets, upon the understanding and agreement that said bank, being the principal creditor of said Frederic L. Grant Shoe Co., would pay the other creditors of said Frederic L. Grant Shoe Co., except your petitioner, the amount of their various claims, which are comparatively small in amount, and would out of the proceeds of said property reimburse itself for such payments and pay to itself the amount of the indebtedness to it of said Frederic L. Grant Shoe Co. That the result of such
6 transfer is that all of the creditors of said Frederic L. Grant Shoe Co., except your petitioner, will receive a large percent-

age of the amount of their claims, and that your petitioner will receive nothing upon its claim.

Ninth: That within four months preceding the filing of this petition, and since May 1st, 1903, said Frederic L. Grant Shoe Co. being at all of said times insolvent, committed other acts of bankruptcy, in that it did, from time to time, pay various creditors to which it was indebted, whose names and addresses are unknown to this petitioner, various amounts in settlement of the claims of said creditors, and in that since said May 1st, 1903, it has from time to time, the precise dates being unknown to this petitioner, paid to said German American Bank various sums, the amounts of which are unknown to this petitioner, to apply upon the indebtedness to said German American Bank of said Frederic L. Grant Shoe Co., and in that it paid to the estate of C. B. Woodworth, a crediter, on or about June 20th, 1903, the amount of its indebtedness to said estate, being about the sum of $175.

Tenth: That the result of said transfer to said German American Bank and of said payments to the estate of C. B. Woodworth and to said German American Bank, and to said various other creditors, and each of them, will be that said German American Bank and said estate of C. B. Woodworth and said various other creditors will receive a preference upon their claims over and
7 above other creditors of the same class, and that such transfer and such payments, and each of them, was made by said Frederic L. Grant Shoe Co. with intent to prefer such creditors over its other creditors.

Wherefore, your petitioner prays that service of this petition, with a subpœna, may be made upon said Frederic L. Grant Shoe Co. as provided by the bankruptcy law of 1898, as amended, and that it may be adjudged bankrupt within the purview of such law.

W. M. LAIRD COMPANY, *Petitioner,*
By ELLIOTT S. THOMAS.

McGUIRE & WOOD,
Attorneys for Petitioner,
711-717 *Wilder Building, Rochester, N. Y.*

8 STATE OF PENNSYLVANIA,
County of Allegheny, City of Pittsburg, ss:

Elliott S. Thomas, being duly sworn, deposes and says that he is a director of W. M. Laird Company (at the head of the purchasing department and personally asquainted with all the facts herein,) the petitioning creditor mentioned and described in the foregoing petition. That said petitioner is a corporation duly organized and existing under and by virtue of the Laws of the State of New Jersey, and that he does hereby make solemn oath that the statements of fact contained in said petition are true according to the best of his knowledge, information and belief.

ELLIOTT S. THOMAS.

Subscribed and sworn to before me, this 10th day of July, 1903.
[SEAL.] E. J. HUMBERT,
Notary Public.

My appointment dated Apr. 21, 1903.
My commission expires end next session of Senate.

9 Endorsed: No. 1502. United States District Court, Western District of New York. *In re* Frederic L. Grant Shoe Co. an alleged bankrupt. Petition. McGuire & Wood, Attorneys for petitioner, 711-717 Wilder Building, Rochester, N. Y. Filed Jul. 15, 1903, at 9.30 o'c. A. M. George P. Keating, Clerk.

10 In the District Court of the United States for the Western District of New York.

In the Matter of FREDERIC L. GRANT SHOE COMPANY, an Alleged Bankrupt.

In Bankruptcy. No. 1502.

At the City of Rochester, in said District, on the 23rd day of July, A. D., 1903.

And now, the said Frederick L. Grant Shoe Company appears and denies that it has committed the act or any or either of the acts of bankruptcy, set forth in said petition, or that it is insolvent, and avers that it should not be declared bankrupt for any cause in said petition alleged, and it demands that the same may be inquired of by a jury.

Second.

The defendant, Frederic L. Grant Shoe Company, by protestation, not confessing nor acknowledging all or any of the matters or things in the said petition of said petitioner mentioned and contained to be true, in such manner and form as the same are therein set forth and alleged for plea to the whole of said petition:

This defendant says that said petitioner, W. M. Laird Company of Pittsburg, Pennsylvania is not a creditor in the manner or form alleged in said petition of this defendant and that the alleged demand of said petitioner mentioned and referred to in its said pe-
10½ tition, is not provable against said defendant as in said petition alleged, nor does the alleged demand of said petitioner against said defendant amount to five hundred dollars, or any other sum, and that said petitioner was not at the time of filing said petition herein, entitled to demand of said defendant for the alleged cause therein stated or for any other cause, the said sum of five hundred dollars, or any other sum, on account of any matter or thing alleged in said petition; that said petitioner has and had no such demand as set forth in said petition, nor had the demand amounting to the sum of three thousand seven hundred thirty-two

dollars and eighty cents ($3732.80) or any other sum due from said defendant to said petitioner for or on account of any matter or thing alleged in said petition, nor for or on account of any breach of any contract or for any other cause amounting in the aggregate to said sum of three thousand seven hundred thirty-two dollars and eighty cents, or any other sums.

Said defendant admits that at the time mentioned in said petition, said defendant was and is a corporation. It denies that it was or is incorporated under the Laws of the State of New York, and on the contrary alleges that it was at all of said times and still is a corporation duly organized, chartered and incorporated under, by virtue of and pursuant to the laws of the State of Arizona, and having its office and principal place of business in the City of Rochester, County of Monroe and State of New York. Said defendant admits that for the greater portion of the six months next preceding the date of filing of said petition, said defendant had had its
11 office and principal place of business at the City of Rochester, aforesaid, in the Western District of the State of New York, and that said defendant was organized for, has been and is a manufacturer of shoes and is engaged principally in manufacturing and mercantile pursuits. Said defendant admits that it owes debts to the amount of one thousand dollars and over. And it denies that it is insolvent. It admits that it has less than twelve creditors.

Said defendant admits that said petitioner is a corporation organized and existing as is alleged in said petition. Said defendant denies that said petitioner is a creditor or has provable claims against it amounting in the aggregate to more than five hundred dollars or any other sum.

Said petitioner admits that on or about September 3rd, 1902, and between that date and May 22nd, 1903, said petitioner purchased of said defendant, at various times, various amounts of merchandise consisting of women's shoes, and that said petitioner has paid said defendant in full the price agreed to be paid therefor. Said defendant denies that prior to the purchase of any of said shoes or at any other time, said defendant did, in consideration of such purchase by said petitioner, or for any other consideration, agree to guaranty or warrant that said shoes so sold by it to said petitioner, should be first class in every or any particular, both as to workmanship or material or as to either, or that they would give perfect satisfaction. Said defendant alleges on the contrary, that none of said sales were accompanied by an express warranty of any kind.
12 And it denies that there has been a breach of said express warranty or any warranty, and, upon information and belief it denies that said shoes or any of them were defective in workmanship or material as is alleged in said petition. And it denies that by reason of the facts and circumstances alleged in said petition, that said petitioner has sustained damages in the amount of three thousand seven hundred thirty-two dollars and eighty cents, or in any other sum. And said defendant denies each and every other allegation in said petition contained.

Said defendant alleges upon information and belief that this pro-

ceeding was not instituted nor is it prosecuted in good faith upon behalf of said petitioner for the relief afforded by the National Bankruptcy Law of 1898, entitled, "An Act to establish a uniform system of Bankruptcy throughout the United States," but was instituted for sinister, oppressive and vicious purposes and for the purpose of forcing said defendant to pay said petitioner a claim to which it is not entitled. All of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct; and humbly prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

SATTERLEE, BISSELL, TAYLOR & FRENCH,
Attorneys for Defendant, 9th Floor
German Insurance Bldg., Rochester, N. Y.

13 STATE OF NEW YORK,
Western District of New York, County of Monroe,
City of Rochester, ss:

Frederic L. Grant, makes solemn oath and says: That he is President of the above named defendant, which is a corporation organized, chartered and incorporated under, by virtue of and pursuant to the Laws of the State of Arizona, and having its principal place of business at the said City of Rochester. So much of the foregoing answer as concerns his own acts and deeds, is true, to the best of his knowledge, and so much as concerns the acts and deeds of any other person or persons he believes to be true. He further says that the foregoing answer is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

FREDERIC L. GRANT.

Sworn to before me, this 23d day of July, 1903.

S. A. CROSTON,
[SEAL.] *Notary Public.*

Endorsed: No. 1502. United States District Court, Western District of New York. In the matter of Frederic L. Grant Shoe Company, an alleged bankrupt. Answer. Satterlee, Bissell, Taylor & French, Attorneys for defendant, 9th Floor German Insurance Building, Rochester, N. Y. Filed Jul. 26, 1903. George P. Keating, Clerk.

14 United States District Court, Western District of New York.

In the Matter of FREDERIC L. GRANT SHOE COMPANY, an Alleged Bankrupt.

In Bankruptcy. No. 1502.

The issues in the above entitled proceeding were tried on May 17th, 1905, at the City of Rochester, in said district, before the court and the following jury:

Charles A. Seaman,	Robert F. Hopwood,
Casper Vogel,	Edward G. Critchell,
Wm. B. Blackmon,	W. P. Frantz,
George J. Wunder,	Frank E. Daggs,
De Witt C. Denison,	Edward G. Hallauer,
Frederick Herman,	Henry C. Kennedy.

At the close of the petitioning creditor's evidence, no evidence being given in behalf of the alleged bankrupt, the court directed the jury to find,

First: That the petitioning creditor has a claim against the alleged bankrupt in the sum of $3454.

Second: That the transfer by the bankrupt of its property to the German-American Bank, a creditor, was to enable it to obtain a greater percentage of its debt than any other creditor of the same class.

The jury thereupon found pursuant to said directions.

SIDNEY W. PETRIE, *Clerk.*

15 At a regular term of the United States District Court, held in and for the Western District of New York, at the Government Building, in the City of Rochester, N. Y., on the 18th day of May, 1905.

Present: Hon. John R. Hazel, District Judge.

United States District Court for the Western District of New York.

In the Matter of FREDERIC L. GRANT SHOE COMPANY, a Bankrupt. No. 1502.

A petition in involuntary bankruptcy having been filed herein by W. M. Laird Company, praying that the Frederic L. Grant Shoe Company, be declared bankrupt; and said alleged bankrupt having filed an answer, denying its insolvency and the commission of any of the acts of bankruptcy alleged in the petition, and demanding a trial by jury of said issues; and said alleged bankrupt having heretofore made a motion to dismiss said petition, and an order having been previously entered herein on September 9th, 1903, denying said motion and directing that the claim of the petitioner, as alleged in the petition, be liquidated by the jury at the jury trial demanded as aforesaid, which order, upon appeal therefrom, was duly affirmed by the United States Circuit Court of Appeals for the Second Circuit, and the said matters having come on for trial at a regular Term of the United States District Court for the Western District of New York, held at the Government Building, in the City of Rochester, N. Y., on the second Tuesday of May, 1905, and having
16 been tried on the 17th and 18th days of May, 1905, before Hon. John R. Hazel, District Judge, and a jury, Hiram R. Wood, Esq., appearing in behalf of the petitioner, and Porter M. French, Esq., appearing for the alleged bankrupt, and at the close of all the evidence the Court having directed the jury to find a ver-

dict that the said alleged bankrupt did, within four months of the filing of the petition herein, commit an act of bankruptcy, in that it transferred a portion of its property to the German American Bank of Rochester, one of its creditors, with the intent to prefer said German American Bank over its other creditors, and that at the time of said transfer said alleged bankrupt was insolvent, and that the petitioner has a provable claim against said alleged bankrupt for damages for the breach of warranty in the sale of shoes, and that the amount of such claim of the petitioner is the sum of $3,454.00, and the jury having found a verdict accordingly;

Now, upon motion of McGuire & Wood, attorneys for the petitioner, it is

Ordered, adjudged and decreed:

First: That Frederic L. Grant Shoe Company, a corporation, having its principal office and place of business in the City of Rochester, N. Y., is hereby declared and adjudged bankrupt.

Second: That the claim of the W. M. Laird Company, the petitioner herein, against said bankrupt, for damages for breach of warranty in the sale of shoes as alleged in the petition, be,
17 and the same hereby is, liquidated and established at the sum of $3,454.00, at which sum it may be proved and allowed herein.

Third: That the petitioner, W. M. Laird Company, recover and be paid out of the bankrupt's estate in due course of administration, the same costs and disbursements that are allowed to a party recovering in a suit in equity when paid out of a fund in court, the same to be fixed and allowed by the referee to whom this matter shall hereafter be referred.

JOHN R. HAZEL, *U. S. J.*

Endorsed: No. 1502. United States District Court, Western District of New York. In the matter of Frederic L. Grant Shoe Company, a bankrupt. Adjudication of bankruptcy and liquidation of claim. McGuire & Wood, Attorneys for petitioner, 711-717 Wilder Building, Rochester, N. Y., Filed Jun. 8, 1905. Sidney W. Petrie, Clerk.

18 In the District Court of the United States for the Western District of New York.

In the Matter of FREDERIC L. GRANT SHOE COMPANY, Bankrupt.

In Bankruptcy. No. 1502.

The above entitled cause being a case in which the above named Frederic L. Grant Shoe Company is entitled to take an appeal to the Supreme Court of the United States from the adjudication of bankruptcy herein, and pursuant to the requirements of General Order in Bankruptcy, numbered thirty-six, I make and file the following finding of facts and conclusions of law thereon, separately:

I find as a matter of fact:

First: That on the 15th day of July, 1903, W. M. Laird Company of Pittsburg, Pennsylvania, filed in the office of the Clerk of the United States District Court for the Western District of New York, at Buffalo, New York, its petition against the above named Frederic L. Grant Shoe Company, wherein said petitioner prayed that service of said petition with a subpœna might be made upon said Frederic L. Grant Shoe Company, as provided by the Bankruptcy Law of 1898, as amended, and that it might be adjudged a bankrupt within the purview of such law.

Second: That at the time of filing said petition, said above named Frederic L. Grant Shoe Company was a corporation having
19 its office and principal place of business in the City of Rochester, Monroe County, New York, and that for the greater portion of six months next preceding the date of the filing of said petition, said Frederic L. Grant Shoe Company had its office and principal place of business at said City of Rochester in said Western District of New York, and that it was organized for, had been and was engaged principally in manufacturing and mercantile pursuits.

Third: That at the time of filing said petition, said Frederic L. Grant Shoe Company owed debts to the amount of one thousand dollars and over, and that it was insolvent; that it then had less than twelve creditors and at that time it owed no debts except an indebtedness owing by it to the German-American Bank of Rochester, and the claims hereinafter set forth on account of damages for breach of warranty which accompanied the sale of personal property, owing to said petitioner.

Fourth: That said petitioner, said W. M. Laird Company, at the time of filing said petition was a corporation duly organized and existing under and by virtue of the Laws of the State of New Jersey, engaged in the business of buying and selling shoes and having its office and principal place of business in the City of Pittsburg, in the State of Pennsylvania.

Fifth: That said petitioner, at the time of filing said petition, was a creditor of said Frederic L. Grant Shoe Company having
20 a provable claim against it amounting to more than five hundred dollars, and that it had no security of any kind for said debt, or any part thereof, and that it had not received a preference, within the meaning of the Bankruptcy Act as amended.

Sixth: That said petitioner, said W. M. Laird Company's claim above referred to, arose from the following transactions and circumstances. On or about September 3rd, 1902, and between that date and May 22nd, 1903, said petitioner purchased of said Frederic L. Grant Shoe Company, at various times and in various amounts, merchandise consisting of women's shoes, to be manufactured by said Frederic L. Grant Shoe Company for said petitioner, in accordance with samples shown said petitioner when the orders therefor were given; that said petitioner received said shoes from time to time and remitted and paid to said Frederic L. Grant Shoe Company the price agreed to be paid therefor, and that all of said shoes so delivered

had been fully paid for in accordance with the terms upon which they were purchased; that prior to the purchase of any of said shoes, said Frederic L. Grant Shoe Company did, for a valuable consideration, and in consideration of said purchase, expressly guarantee and warrant that said shoes so manufactured and sold by it to said petitioner, should be first-class in every particular, both as to workmanship and materials, and that they would give perfect satisfaction; that said Frederic L. Grant Shoe Company made a breach of said express warranty in that, of the shoes so sold and delivered to said petitioner, as aforesaid, there were a large number of pairs of women's shoes which were defective in workmanship and materials and
21 which were not made of proper materials, by reason of which said petitioner sustained damage in the sum of three thousand four hundred and fifty-four dollars ($3,454.00); that said defects were latent defects and were undiscoverable upon an examination of said shoes by mere inspection.

Seventh: That within four months preceding the filing of said petition herein, said Frederic L. Grant Shoe Company did commit an act of bankruptcy, in that it transferred a portion of its property to said German-American Bank of Rochester, one of its creditors, with intent to prefer said German-American Bank of Rochester over its other creditors.

Eighth: That said Frederic L. Grant Shoe Company on the 28th day of July, 1903, filed in the office of the Clerk of the United States District Court for the Western District of New York, at Buffalo, New York, its answer to said petition, and said matter came on to be heard at a regular term of said United States District Court held in the City of Rochester, New York, commencing on the second Tuesday of May, 1905, and said Frederic L. Grant Shoe Company then and there made a motion to dismiss this proceeding upon the ground that said petitioner had no provable claim against it, that it had no standing in court to ask for an adjudication of bankruptcy, and that this Court had no jurisdiction to entertain said proceeding or to adjudge it a bankrupt; that the only creditor of said Frederic L. Grant Shoe Company, aside from said petitioner, namely, German-American Bank of Rochester, appeared by its counsel and united in said motion, and that said motion was, by the Court, then and there denied.

22 Ninth: That the fact of insolvency and the commission of an act of bankruptcy on the part of said Frederic L. Grant Shoe Company, was then and there, in open court, admitted; whereupon the Court proceeded, with the aid of a jury, to liquidate the said claim of said petitioner. No evidence was offered upon the part of said Frederic L. Grant Shoe Company and the said claim of said petitioner was then and there, thereupon, liquidated at said sum of three thousand four hundred and fifty-four dollars ($3,454.00).

I find as conclusions of law:

First: That at the time of filing said petition said petitioner, the W. M. Laird Company, had a provable claim against said Frederic L. Grant Shoe Company.

Second: That this Court had jurisdiction to entertain this pro-

ceeding and render a judgment adjudging said Frederic L. Grant Shoe Company a bankrupt.

Third: That said Frederic L. Grant Shoe Company, a corporation having its principal office and place of business in the City of Rochester, New York, be and it hereby is declared and adjudged a bankrupt.

Fourth: That the said claim of the petitioner, said W. M. Laird Company, against said bankrupt, for damages for breach of warranty in the sale of shoes as alleged in said petition, be and the same hereby is liquidated and established at the sum of three thousand four hundred fifty-four dollars ($3,454.00) at which sum it may be proved and allowed herewith.

23 Fifth: That said petitioner, W. M. Laird Company recover and be paid out of the bankrupt's estate, in due course of administration, the same costs and disbursements that are allowed to a party recovering in a suit in equity when paid out of the funds in court, the same to be fixed and allowed by the referee to whom this matter shall hereafter be referred.

Dated, June 7, 1905. JOHN R. HAZEL, *U. S. J.*

O. K.

McG. & WOOD.

24 Endorsed: No. 1502. United States District Court, Western District of New York. In the matter of Frederic L. Grant Shoe Company, bankrupt. Findings of fact and conclusions of law. Filed June 8, 1905, Sidney W. Petrie, Clerk.

25 In the District Court of the United States for the Western District of New York.

In the Matter of FREDERIC L. GRANT SHOE COMPANY, Bankrupt.

In Bankruptcy. No. 1502.

The above named Frederic L. Grant Shoe Company, bankrupt, conceiving itself aggrieved by the judgment and decree made and entered on the 7th day of June, 1905, in the above entitled cause, adjudging said Frederic L. Grant Shoe Company, a bankrupt, does hereby appeal from said judgment and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal be allowed and that a transcript of the record, proceedings and papers, upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated June 7, 1905.

EUGENE H. SATTERLEE.
CHARLES J. BISSELL.
JOSEPH W. TAYLOR AND
PORTER M. FRENCH.

SATTERLEE, BISSELL, TAYLOR & FRENCH,
Attorneys for Bankrupt, 9th Floor German Insurance Bldg., Rochester, New York.

The foregoing claim of appeal is allowed and the W. M. Laird Company of Pittsburg, Pennsylvania, may be made appellee. Said appeal is to operate as a supersedeas of the decree and judgment of bankrupt above referred to upon the execution of a bond in
26 the penalty of two hundred and fifty dollars. The Ætna Indemnity Company is accepted on said bond as surety and said bond is now approved.

Dated June 7th, 1905.

JOHN R. HAZEL.
United States District Judge for the Western District of New York.

27 Endorsed: No. 1502. United States District Court, Western District of New York. In the matter of Frederic L. Grant Shoe Company, a bankrupt. Notice of appeal and allowance of appeal. Satterlee, Bissell, Taylor & French, Attorneys for bankrupt, appellant, 9th Floor, German Insurance Building, Rochester, N. Y. Filed Jun. 8, 1905, Sidney W. Petrie, Clerk.

28 In the District Court of the United States for the Western District of New York.

In the Matter of FREDERIC L. GRANT SHOE COMPANY, Bankrupt.

In Bankruptcy. No. 1502.

The Frederic L. Grant Shoe Company, the above named appellant, hereby assigns error to the decision and judgment of the District Court of the United States for the Western District of New York, herein, in the following particulars:

First: In that it decided that under the petition and answer in this case it had jurisdiction to entertain the proceeding and render a judgment adjudging that said Frederic L. Grant Shoe Company, said appellant, is a bankrupt.

Second: That said District Court had no jurisdiction to so adjudge, because it appears from said petition and answer, that said petitioner, said W. M. Laird Company, at the time of filing said petition, had no provable claim against said Frederic L. Grant Shoe Company, to the extent of five hundred dollars or any other sum.

Third: That said District Court had no jurisdiction to so adjudge that said Frederic L. Grant Shoe Company, said appellant, is a bankrupt, because it appears from said petition and answer herein, that the claim of said petitioner in bankruptcy, said W. M. Laird Company, is based wholly upon damages alleged to have been sustained by it by reason of a pretended breach of the warranty
29 which accompanied the sale of personal property, which damages had never been in any way liquidated, and the pretended facts upon which said damages are based, are by said answer, denied.

Fourth: That said District Court had no jurisdiction to so adjudge that said Frederic L. Grant Shoe Company, said apellant, is a bankrupt, because under the Bankruptcy Act of 1898, there is no possible way for said petitioner's claim in bankruptcy to become liquidated, excepting pursuant to the provisions of Section 63-b, which provides for liquidating unliquidated claims in such manner as the court shall direct and that thereafter such claims may be proved and allowed against the estate; that the statute plainly shows the intention that there shall first be an adjudication in bankruptcy before such unliquidated and disputed claims can be in any manner proven.

Fifth: That said District Court had no jurisdiction to so adjudge that said Frederic L. Grant Shoe Company, said appellant, is a bankrupt, in that said United States District Court for the Western District of New York, erroneously denied the motion of said Frederic L. Grant Shoe Company, said appellant, to dismiss said proceeding, upon the ground that said petitioner, said W. M. Laird Company, had no provable claim at the time of filing its petition and that said Court was wholly without jurisdiction.

30 Dated June 7, 1905.

SATTERLEE, BISSELL, TAYLOR & FRENCH,

Attorneys for Frederic L. Grant Shoe Company, Appellant, 9th Floor, German Insurance Building, Rochester, New York.

31 Endorsed: No. 1502. United States District Court, Western District of New York. In the matter of Frederic L. Grant Shoe Company, a bankrupt. Assignment of error. Satterlee, Bissell, Taylor & French, Attorneys for bankrupt, appellant, 9th Floor, German Insurance Building, Rochester, N. Y. Filed Jun. 8, 1905, Sidney W. Petrie, Clerk.

32 In the District Court of the United States for the Western District of New York.

In the Matter of FREDERIC L. GRANT SHOE COMPANY, Bankrupt.

In Bankruptcy. No. 1502.

In this case I hereby certify, that when said case came on to be heard at a Term of this Court, held at the City of Rochester commencing on the second Tuesday of May, 1905, counsel for the alleged bankrupt, said Frederic L. Grant Shoe Company, at the opening of said hearing, moved to dismiss said petition in bankruptcy and the proceedings herein, upon the ground, as alleged, that said Court had no jurisdiction to entertain said proceeding or to render a decree, or order an adjudication of bankruptcy herein against said alleged bankrupt, for the reason that said petitioner, W. M. Laird Company had, at the time of filing its petition herein, no provable

claim against said bankrupt to the extent of five hundred dollars or any other sum, and had no standing in court to ask that said alleged bankrupt be adjudged a bankrupt; for the reason that the claim of said petitioner in bankruptcy, said W. M. Laird Company, is based wholly upon damages alleged to have been sustained by it by reason of a pretended breach of the warranty which accompanied the sale of personal property, which damages had never been in any way liquidated, and the pretended facts upon which said damages are based are by the answer herein denied; for the reason that under the Bankruptcy Act of 1898, there is no possible way for said pe-
33 titioner's claim in bankruptcy to become liquidated, except pursuant to the provisions of Section 63-b, which provides for liquidating unliquidated claims in such manner as the court shall direct and that thereafter such claims may be proved and allowed against the estate; for the reason that the statute plainly shows the intention that there shall first be an adjudication in bankruptcy before such unliquidated and disputed claim can be in any manner proven; for the reason that under the circumstances shown by the petition and answer herein, said Court was wholly without jurisdiction. I thereupon denied said motion to dismiss, and counsel for said alleged bankrupt, said Frederic L. Grant Shoe Company thereupon then and there duly excepted to such ruling.

I further certify that upon the trial which followed the denial of said motion, there was no testimony offered upon the part of said alleged bankrupt. Said petitioning creditor, said W. M. Laird Company, proceeded to establish its claim for damages sustained on account of the alleged breach of warranty which accompanied the sale of personal property, and said claim was then and there established at the sum of three thousand four hundred fifty-four dollars ($3,454.00).

I hereby certify that said question of jurisdiction was the only question in issue therein and that at the termination of the testimony offered by said petitioner herein, I directed a verdict establishing said petitioner's claim at the amount above stated, and ad-
34 judging that said Frederic L. Grant Shoe Company was a bankrupt.

This certificate is made conformably to the Act of Congress of March 3rd, 1891, Chapter 517, and said question of jurisdiction is the only question certified by me under this certificate to the Supreme Court.

Dated June 7, 1905.

JOHN R. HAZEL,
United States District Judge for Western District of New York.

35 Endorsed: No. 1502. United States District Court, Western District of New York. In the matter of Frederic L. Grant Shoe Company, bankrupt. Certificate of jurisdictional question involved. Filed June 8, 1905, Sidney W. Petrie, Clerk.

36 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to W. M. Laird Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at the City of Washington, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the District Court of the United States for the Western District of New York, and filed in the Clerk's office of said Court on the 7th day of June, 1905, in a cause wherein the Frederic L. Grant Shoe Company is appellant, and you, said W. M. Laird Company, are appellee, to show cause, if any, why the decree rendered against the said appellant by said United States District Court, which adjudged said appellant a bankrupt and which was entered in the Clerk's office of said United States District Court at Buffalo, New York, on the 7th day of June, 1905, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness Hon. John R. Hazel, United States District Judge for the Western District of New York, at Buffalo, New York, this 7th day of June, 1905.

JOHN R. HAZEL,
Judge United States District Court
for the Western District of New York.

Service of a copy of the foregoing citation is hereby admitted this 12 day of June, 1905.

McGUIRE AND WOOD,
Attorneys for Appellee.

37 Endorsed: No. 1502, In Bankruptcy. United States District Court, Western District of New York. In the matter of Frederic L. Grant Shoe Company, bankrupt. Citation. Satterlee, Bissell, Taylor & French, Attorneys for bankrupt, appellant, 9th floor German Insurance Building, Rochester, N. Y. Filed Jun. 13, 1905, Sidney W. Petrie, Clerk.

38 In the District Court of the United States for the Western District of New York.

In the Matter of FREDERIC L. GRANT SHOE COMPANY, Bankrupt.

In Bankruptcy. No. 1502.

To the Clerk:

You are requested to take a transcript of record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record, the following and no other papers, to wit:

First: Subpœna.
Second: Petition in bankruptcy.
Third: Answer of alleged bankrupt.

Fourth: Judgment or adjudication of bankruptcy.
Fifth: Findings of Fact and Conclusions of Law.
Sixth: Notice of appeal to Supreme Court.
Seventh: Assignment of errors.
Eighth: Allowance of appeal.
Ninth: Certificate of jurisdictional question involved.
Tenth: Citation.
Eleventh: Præcipe for transcript.
Twelfth: Certificate to correctness of transcript of record.

Yours, etc.,
SATTERLEE, BISSELL, TAYLOR & FRENCH,
Attorneys for Appellant.

39 Endorsed: No. 1502. United States District Court, Western District of New York. In the matter of Frederic L. Grant Shoe Company, a bankrupt. Præcipe for transcript. Satterlee, Bissell, Taylor & French, Attorneys for bankrupt, appellant, 9th Floor, German Insurance Building, Rochester, N. Y. Filed Jun. 8, 1905, Sidney W. Petrie, Clerk.

40 UNITED STATES OF AMERICA,
Western District of New York, ss:

I, Sidney W. Petrie, Clerk of the District Court of the United States of America for the Western District of New York, do hereby certify that the foregoing pages, numbered from 1 to — inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause entitled "In Bankruptcy, No. 1502. In the matter of Frederic L. Grant Shoe Company, an alleged bankrupt," appellant, as the same remain of record and on file in my office, as follows: subpœna, petition, answer, clerk's minutes, adjudication of bankruptcy and liquidation of claim, findings of fact and conclusions of law, notice of appeal and allowance of same, assignment of error, certificate of jurisdictional question involved, citation, præcipe for transcript.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of Buffalo, in said district, this 21st day of June, in the year of our Lord one thousand nine hundred and five, and of the Independence of the said United States the one hundred and twenty-ninth.

[United States District Court, Seal. Western District of New York.]

SIDNEY W. PETRIE, *Clerk.*

41 [Endorsed:] United States Supreme Court. In the matter of Frederic L. Grant Shoe Co. bankrupt-appellant. Record on appeal from United States District Court, Western District of New York.

Endorsed on cover: File No. 19,820. W. New York D. C. U. S. Term No. 318. Frederic L. Grant Shoe Company, appellant, *vs.* W. M. Laird Company. Filed June 28th, 1905. File No. 19,820.

FILE COPY.

Supreme Court of the United States

~~*October Term, 1905, No. 318*~~

October Term, 1906, No. 63

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JAMES H. McKENNEY

FREDERIC L. GRANT SHOE COMPANY

Appellant,

against

W. M. LAIRD COMPANY

Appellee

BRIEF FOR APPELLANT

SATTERLEE, BISSELL, TAYLOR & FRENCH,

Attorneys for Appellant,

ROCHESTER, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1905. NO. 318.

OCTOBER TERM, 1906. NO. 63.

FREDERIC L. GRANT SHOE COMPANY,
Appellant.

vs.

W. M. LAIRD COMPANY.
Appellee.

Appeal from the judgment of the United States District Court for the Western District of New York, which, on June 7th, 1905, adjudged the appellant a bankrupt.

BRIEF FOR APPELLANT.

Statement of the Case.

The question presented attacks the jurisdiction of the District Court and is whether an unliquidated and disputed claim, based upon damages sustained upon the breach of warranty, which accompanied the sale of personal property, will support a petition in bankruptcy.

The appellant has only two creditors, namely, the appellee and The German-American Bank of Rochester, N. Y. (record page 10).

On July 15th (record pages 5 and 10) W. M. Laird Company, said appellee, a corporation organized under the laws of the State of New Jersey, having its principal place of business at Pittsburg, Pa. (record page 2) filed in the office of the Clerk of the United States District Court for the Western District of New York, its petition, signed by itself alone (record pages 2, 3, 4 and 10) asking that the Frederic L. Grant Shoe Company, said appellant, a manufacturing corporation, having its principal place of business at Rochester, New York, (record page 2) be adjudged a bankrupt. The claim of said appellee, upon which said petition in bankruptcy is founded, is based wholly upon an unliquidated demand for damages, sustained by reason of an alleged breach of warranty claimed to have accompanied the sale of personal property, (record pages 2, 3 and 10). A subpoena issued out of the District Court, together with the petition referred to, was served upon said appellant on July 18th, 1903 (record page 1). On July 28th, 1903, (record pages 7 and 11) said appellant filed in the office of the Clerk of said District Court, its answer (record pages 5, 6 and 7), wherein it denies the giving of the warranty and its breach. The claim, which is the basis of the petition in bankruptcy, is therefore not only unliquidated but disputed.

When the proceeding was reached for trial upon the petition and answer, said appellant, at the opening of the hearing, moved to dismiss said petition and said proceeding upon the ground that said District Court had no jurisdiction to entertain said proceeding or render a decree or order an adjudication of bankruptcy against said appellant(record pages 11 and 14). The reasons stated why said District Court had no jurisdiction of said proceeding were that said appellee, at the time of filing its petition herein, had no provable claim against said appellant to the extent of five hundred dollars ($500) or any other sum, and had no standing in Court to ask that said appellant be adjudged a bankrupt; that the claim of said appellant was based wholly upon damages alleged to have been sustained by it by reason of a pretended breach of a warranty which accompanied the sale of personal property, which damages had never been in any way liquidated, and the pretended facts upon which said damages were based were, by the answer, denied; that under the Bankruptcy Act of 1898, there was no possible way for said appellee's claim in bankruptcy to become liquidated, except pursuant to the provisions of section 63b, which provides for liquidating unliquidated claims in such manner

as the Court shall direct, and that thereafter such claims may be proved and allowed against the estate; that the statute plainly shows the intention that there shall first be an adjudication in bankruptcy before such unliquidated and disputed claim can be in any manner proved (record pages 14 and 15).

At the time of making said motion The German-American Bank of Rochester the only other creditor of said appellant (record page 10), appeared by its counsel and united in said motion (record page 11). Said motion was, by the Court, denied, to which ruling appellant's counsel then and there duly excepted (record page 15).

Upon the trial, which followed the denial of said motion, there was no testimony offered on the part of said appellant. Said appellee proceeded to establish its claim for said damages and it was established at the sum of three thousand four hundred and fifty-four dollars ($3,454) (record pages 11 and 15). The fact of insolvency and the commission of an act of bankruptcy on the part of said appellant was, in open Court, admitted, and the Court thereupon adjudged that said appellant was a bankrupt (record pages 11, 8 and 9). The Court thereafter made and filed its findings of fact and conclusions of law (record pages 9, 10, 11 and 12) and said appellant, feeling aggrieved by said judgment, filed assignments of error (record pages 13 and 14), together with its appeal from said judgment to this Court (record page 12), which appeal was allowed by the Judge of the District Court (record page 13), and the jurisdictional question referred to is duly certified to this court (record pages 14, 15).

SPECIFICATION OF ERROR RELIED UPON.

The court below erred in denying appellant's motion, made at the commencement of the hearing, to dismiss the proceeding for want of jurisdiction (record pages 11, 14 and 15) because an unliquidated and disputed claim, based upon damages sustained upon the breach of warranty which accompanied the sale of personal property, will not support a petition in bankruptcy.

This question is raised by appellant's exception to the court's ruling (record page 15), by the assignment of error (record pages 13 and 14), the allowance of this appeal (record page 13), and by the certificate of said jurisdictional question to this court (record pages 14 and 15).

ARGUMENT.

First.

THIS APPEAL WHICH PRESENTS A QUESTION OF JURISDICTION OF THE DISTRICT COURT ARISING UNDER THE BANKRUPTCY ACT OF JULY 1st, 1898, IS AFTER FINAL JUDGMENT WELL TAKEN UNDER THE PROVISIONS OF THAT ACT AND THE FIFTH SECTION OF THE JUDICIARY ACT OF MARCH 3d, 1891.

Bankruptcy act of July 1st, 1898, sections 24 and 25 (30 Stat. at L. 554, chap. 541, U. S. Comp. Stat. 1901, pp. 3431 and 3432).

Judiciary Act of March 3, 1891, section 5 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 549).

U. S. vs. Jahn, 155 U. S. 109, 114, 115.

Barders vs. First National Bank, 175 U. S. 526.

Second.

The provisions of the bankruptcy act of 1898 which are applicable to the question presented (30 Stat. at L. 554, chap. 541, U. S. Comp. Stat. 1901, pp. 3445 and 3447) are as follows:

"Section 59. Who may file and dismiss petitions.— * * * (*b*) Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt."

"Section 63. Debts which may be proved.—(*a*) Debts of the bankrupt may be proved and allowed against his estate which are * * *

"(4) Founded upon an open account or upon a contract express or implied. * * *

"(*b*) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct and may thereafter be proved and allowed against his estate."

In this case, the claim, which is the basis of the petition in bankruptcy, is unliquidated and disputed, and therefore, at the time of

filing and serving the petition, it was not provable. The language of the statute is that an unliquidated claim may be liquidated as directed by the court and may *thereafter,* that is, after such liquidation, be proved. There must first be some proceeding in court in which the application for liquidation may be made, before such claim can become liquidated. No one can file a petition in bankruptcy unless he has, at the time of filing, a provable claim. The fact that he alleges a claim, which may by some subsequent proceeding or action become liquidated and undisputed, and thus provable, does not make him a creditor with a provable claim until such steps are taken. When the time arrives for application for liquidation, the court may decide that he has no claim. It may decide that the statement of facts presented by him is not substantiated by proof. In this case, there being less than twelve creditors, one creditor, whose claim equals five hundred dollars, may file a petition. His claim, however, must be provable, and it must amount at least to five hundred dollars. Until it is liquidated, who is to determine whether it amounts to as much as five hundred dollars? Is it sufficient that a creditor alleges that to be the fact? Upon liquidation the court may decide that the claim amounts to less than five hundred dollars. If the creditor is to decide this matter for himself, it would seem there could be no necessity for the provision of the law for liquidation. If he can determine that his claim amounts to more than five hundred dollars, why may he not fix the exact amount?

The question as to what constitutes a provable claim in involuntary petitions in bankruptcy, has been much discussed. It has been held that unliquidated claims based upon tort will not sustain a petition.

Beers v. Hamlin, 3 Am. Bkr. Rep. 745, 99 Fed. Rep. 695.
In re Brinckmann, 4 Am. Bkr. Rep. 551, 103 Fed. Rep. 65.

The same proposition with reference to actions for breach of warranty has been held in Florida and in Pennsylvania.

In *re Morales* (5 Am. Bkr. Rep. 425, 105 Fed. Rep. 761), was decided in January, 1901, by the United States District Court for the Southern District of Florida, and the opinion is written by Judge Locke. The headnote correctly states the case as follows: "An unliquidated claim for damages for breach of warranty in a contract may not be used as a basis for an adjudication in bankruptcy." In his opinion, Judge Locke refers to the fact that the ancient rule and

practice was that a breach of an alleged warranty, although based on a contract, was not an action for the performance or fulfillment of the contract, but was an action on the case sounding in tort, and could only be presented as such. There is no contract, express or implied, that the Grant Shoe Company would pay the Laird Company any amount of money. It is liable, if at all, for damages on account of a breach of its contract. Judge Locke continues: "It is only the force of law that gives damages for the breach of a warranty in such a case. I consider it should be classed with actions for tort, deceit or fraud, rather than contract, such as is contemplated in section 63, subdivision (a) Cl. 4 of the Law of Bankruptcy." Judge Locke refers, also, to the fact that after an adjudication in bankruptcy, a claim similar to the one presented in this petition might be presented under subdivision (b), section 63 of the Bankruptcy Act, and it would be the duty of the court to determine how such claim, although unliquidated, might be thereafter proved and allowed against the estate. He further says: "But I do not consider that the law contemplated that such an unliquidated claim as this, not capable of proof by any practice in bankruptcy, should be made a basis of an adjudication in bankruptcy." In that case the petition was demurred to and the demurrer was sustained.

In *re Big Meadows Gas Company* (7 Am. Bkr. Rep. 697, 113 Fed. Rep. 974), was decided by the United States District Court for the Northern District of Pennsylvania in February, 1902, the opinion being written by Judge Buffington. There are other questions considered,—a portion of the claim being liquidated and a portion being unliquidated. But it was held that the claim being one claim, presented as such, must be considered an unliquidated claim. The element for unliquidated damages was for a breach of contract. The petitioner's claim was based upon a written instrument and non-performance of its provisions. And it was held that the unliquidated character of some of the elements of the claim made it, as a whole, unliquidated, and subjected it as such to the limitations and statutory provisions incident to a claim of that kind. In his opinion, Judge Buffington uses the following language: "After careful and deliberate consideration of the question here involved, we have reached the conclusion that the unliquidated demand herein made only becomes a provable debt * * * after it has been judicially ascertained and liquidated in the statutory method set forth. Such construction is in accord with other provisions of the act. The provisions requiring petitioning creditors should have claims aggregating five hundred

dollars in excess of all securities, evidences that Congress felt there should be definite, ascertained claims, and that, too, in excess of all securities, as a foundation upon which to base a petition to adjudicate one a bankrupt. Where a claim against another has not been judicially ascertained and where its validity and certainty are evidenced by no paper, acknowledgment, or other admission of the debtor, it would offend our sense of right to allow such self-asserted claim to constitute sufficient ground for harassing another with a petition in bankruptcy. It will readily be seen that an averred but unfounded claim might be made an effective weapon to enforce an unjust demand or even to bankrupt a struggling but solvent debtor. Of course, no such consequence would result from the case at hand. The property of the company has been sold at sheriff's sale, but the question raised is jurisdictional." Judge Buffington, at page 700, cites many cases supporting his construction of the act. An order was granted dismissing the petition.

In both of the cases just cited, the petition was founded upon an unliquidated claim. It does not appear that the claim was also disputed. But is was held in these cases that where the petitioner's claim is based upon breach of contract, he has no standing in court to present a petition for adjudication in bankruptcy, unless his claim has been liquidated.

Matter of Manhattan Ice Company (7 Am. Bkr. Rep. 408, 114 Fed. Rep. 399), affirmed by the Circuit Court of Appeals in the Second Circuit in June, 1902, *sub nomine In re Stern* (8 Am. Bkr. Rep. 569, 116 Fed. Rep. 604), furnishes no authority against the claim that this petition should have been dismissed. In the *Manhattan Ice Company case* the claim was unliquidated, and it was based upon breach of contract. It appears that the fact of the breach of the contract was not disputed, and further, that the damages sustained by reason of the breach were far in excess of the sum of five hundred dollars. The most then, that can be claimed for the *Manhattan Ice Company case,* is, that where the claim is founded upon breach of contract, and the claim of breach is not disputed, and it appears that the damage sustained is sufficient in amount, that then such creditor has a standing in court as a petitioning creditor asking for an adjudication in bankruptcy. The most of the opinion in the Circuit Court of Appeals, which was written by Judge Townsend, is devoted to the question of whether there was a present right of action following immediately upon the breach, although by the terms of the contract the time for its performance had not yet

elapsed. It is submitted, no decision can be found which sustains a petition in involuntary bankruptcy where the petitioner's claim is not only unliquidated, but is also disputed. Under the bankruptcy act there is no possible way for the appellee's claim to become liquidated, except pursuant to the provisions of section 63 (b), which provides for proving unliquidated claims in such manner as the court shall direct, and that after such proof, such claims may be proved and allowed against the estate. This plainly shows the intention of the statute, that there should first be an adjudication in bankruptcy before such unliquidated claim can be in any manner proved. It must then be liquidated in such manner as the court directs, and after such liquidation it may be proved. Such time, of course, had not arrived at the time appellee filed its petition nor when the motion to dismiss was made at the trial. The appellee had no standing in court, and had no provable claim upon which to base its petition. There is no provision in the law for ascertaining the exact amount of the appellee's claim, before adjudication, and as is stated by Judge Buffington in the case of *In re Big Meadows Gas Company*, cited above, it will readily be seen that an averred but unfounded claim might be made an effective weapon to enforce an unjust demand. This question is, of course, jurisdictional, and if appellant is right in its position, the petition in bankruptcy should have been dismissed. The remedy of appellee is at once apparent. It should first, in the proper forum, if it thought it had a valid cause of action, have brought an action for recovery of the damage which it claims to have sustained, and there the question could have been properly tried and decided by a jury. If it had succeeded, this claim would then have become liquidated, and it might then have a standing in court to present a petition of this character.

Cases like the one at bar are not the only cases where the courts have held that a creditor has not a provable claim, though he may have a claim which may, at a later time, become such.

The Bankruptcy Act of 1898 contains provisions concerning preferences given within four months and then provides:

"Section 57, g. The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

Under this section a preferred creditor may, by surrendering his preference, prove his claim. Though he has a claim which, by proper action taken by him, may become provable, it cannot be said that he has a provable claim until such action is taken, and this is for the

same reason as in the case of a creditor with a disputed unliquidated claim. In the one case, the creditor may never surrender his preference; in the other he may never be able to establish his disputed unliquidated claim. In both cases he has no provable claim until the event, under which the claim may become provable, happens.

The situation of an innocent preferred creditor with reference to proving his claim, under section 60, has been considered by this court in *Pirie v. Chicago Title & Trust Company* (182 U. S. 438), where it is held that a creditor who has received payments of money from an insolvent debtor within four months before petition in bankruptcy was filed for the debtor, but who did not know or have reasonable cause to believe that the payments were intended to give him a preference, the debtor not intending to give a preference, cannot be compelled, under the Bankruptcy Act, section 60, b, to repay the money to the trustee in bankruptcy, but under section 57, g, he must surrender the preference that he has received before any claim by him against the estate can be allowed.

The District Court had found the facts and made its first conclusion of law as follows:

"*First.* That the payment made by appellants to the bankrupts at the time and in the manner above shown constitutes a preference, and that by reason of the failure and refusal of said appellants to surrender said preferences, *they were not entitled to prove* their claim against the bankrupts' estate" (page 442) thus holding that until surrender the creditor had no provable claim.

This court, in affirming the decision below, states that "the question presented by this record is whether payments in money made by an insolvent debtor to a creditor, the debtor not intending to give a preference, and the creditor not having reasonable cause to believe a preference was intended, did nevertheless constitute a preference within the meaning of the Bankrupt Act of 1898, and were required to be surrendered *as a condition of proving* the balance of the debt or other claims of the creditor." (Page 443.) In discussing this question, this court says: "What a preference is, is plain. What the effect of it is, if taken under the conditions mentioned, is equally plain. So taken, it may be recovered back. If not so taken, it may be kept or surrendered. Unless surrendered, he who received it *cannot prove his debt or other debts.* His election is between keeping the preference and surrendering it." (Page 447.) This court, by its decision in this case, has not only affirmed the finding of the court below, quoted above, but has taken occasion in its opinion to

emphasize the affirmance by restating the fact that until surrender the preferred creditor cannot prove his debt; that is, has no provable claim.

See also *In re Rogers Milling Co.* 4 Am. Bkr. Rep. 540.
In re Gillette & Prentice, 5 Am. Bkr. Rep. 119.
Phillips v. Dreher Shoe Co. 7 Am. Bkr. Rep. 326.

Before this proceeding was reached for trial in the District Court said appellant moved upon the same grounds to dismiss the proceedings. The motion was denied and upon petition to review was reviewed by the Circuit Court of Appeals, Second Circuit and there affirmed.

11 Am. Bkr. Rep. 48, 125 Fed. Rep. 576.
12 Am. Bkr. Rep. 349, 130 Fed. Rep. 881.

No appeal was then taken to this court because such decisions were both before the final judgment herein and an appeal at that time would have been premature.

Bardes vs. First National Bank, 175 U. S. 526.

It is submitted that the motion to dismiss made at the trial should have been granted and the exception (record page 15) was well taken.

The judgment appealed from should be set aside and reversed, and this court should decree that said petition in bankruptcy be dismissed for want of jurisdiction, with costs.

SATTERLEE, BISSELL, TAYLOR & FRENCH,
Attorneys for Appellant,
9th Floor, German Insurance Bldg.,
Rochester, N. Y.

P. M. FRENCH, *of Counsel for Appellant.*

FILE COPY.

Supreme Court of the United States

[redacted]

October Term, 1906, No. 63

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JAMES H. McKE

FREDERIC L. GRANT SHOE COMPANY,
Appellant,

against

W. M. LAIRD COMPANY
Appellee

BRIEF FOR APPELLEE

McGUIRE & WOOD,
Attorneys for Appellee,
ROCHESTER, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1905. NO. 318.

OCTOBER TERM, 1906. NO. 63.

FREDERICK L. GRANT SHOE COMPANY,
Appellant.

vs.

W. M. LAIRD COMPANY,
Appellee.

This is an appeal from a judgment of the United States District Court for the Western District of New York, which, on June 7th, 1905, adjudged the appellant a bankrupt.

BRIEF FOR APPELLEE.

On the 15th of July, 1903, the appellee, a corporation organized under the laws of the State of New Jersey having its principal place of business at Pittsburg, Pa. (Record page 2) filed in the office of the Clerk of the United States District Court for the Western District of New York its petition asking that the Frederick L. Grant Shoe Company (the appellant) a manufacturing corporation having its principal place of business at Rochester, New York (Record page 2) be adjudged a bankrupt.

The claim of the appellee arises from the following transactions and circumstances. On or about September 3rd, 1902, and between that date and May 22nd, 1903, the appellee purchased from the appellant, at various times and in various amounts, merchandise consisting of women's shoes, the said shoes to be manufactured by said Frederick L. Grant Shoe Company for the appellee in accordance with samples shown the appellee at the various times the orders therefor were given. The shoes were manufactured and delivered to the appellee, aggregating several thousand pairs. Upon receipt of the shoes from time to time the appellee paid the appellant the price agreed to be paid therefor, and all of the shoes so delivered were paid for in accordance with the terms upon which the same were purchased. Prior to the purchase of any of said shoes the appellant did, for a valuable consideration, and in consideration of the purchase by the appellee of said merchandise, expressly agree, guarantee and warrant that all shoes which they might thereafter manufacture for and sell to the appellee would be first class in every particular, both as to workmanship and materials, and would give perfect satisfaction; that such express warranty was made, and was part of the transaction upon each purchase of shoes; that of the amount purchased by the appellee 1864 pairs of women's high heeled shoes were defective both in material and workmanship; that the defects were latent, being undiscoverable on examination, the result of such defects being that the soles of the shoes cracked and split, the heel becomes loosened and comes off, the wooden foundation of the heel splits and breaks so that the shoes cannot be worn, and the appellee has suffered damage to the extent of $3,732.08 (Record page 3).

Upon the filing of such petition in the District Court a subpoena was duly issued, and on July 28th, 1903 the appellant filed in the office of the clerk of the District Court its answer (Record, pages 5, 6 and 7), whereby it denied the giving of the warranty and its breach.

The appellant then and there made a motion to dismiss the petition, which motion was denied (Amer. Bankruptcy Reports, Vol. 11. page 48 ; 125 Federal Rep., 576). Thereupon an appeal was taken from the order denying the motion to dismiss the appeal to the Circuit Court of Appeals for the Second Circuit, and upon such appeal the order of the District Court was affirmed (12 Amer. Bankruptcy Reports, 349; 130 Fed. Rep. 881).

On the 17th of May, 1905 the cause came on for trial before Hon. John R. Hazel, District Judge, and a jury, at a regular term of the United States District Court for the Western District of New York

held at the Government Building in the City of Rochester, New York (Record page 8). Upon the trial of the cause the fact of the insolvency of the appellant and the commission of an act of bankruptcy on the part of the appellant was then and there, in open court, admitted. No evidence was offered on the part of the appellant. Whereupon the Court proceeded, with the aid of the jury, to liquidate the claim of the petitioner, and the same was then and there liquidated at the sum of $3,454.00 (Record page 11). Whereupon the Court directed and adjudged that the appellant be declared and adjudged a bankrupt, and that the claim of the appellee be liquidated at the said sum of $3,454.00, and as so liquidated, allowed (Record page 12). Whereupon an appeal was taken to this court, and the only question to be argued upon this appeal is whether or not, under the circumstances of this case, the District Court had jurisdiction to entertain the petition in bankruptcy and proceed thereon.

ARGUMENT.

The appellant claims that the petitioning creditor herein had no provable claim because, at the time of the filing of the petition the claim was unliquidated and, as claimed by the appellant, disputed.

Just why so much stress is laid upon the fact that the claim is disputed, we do not see. Certainly the Bankruptcy Act does not provide that petitioning creditors must have undisputed claims. If that were so the involuntary features of the Bankruptcy Act would be useless. To defeat an involuntary bankruptcy proceeding, it would only be necessary for the alleged bankrupt to dispute the claim of the petitioning creditors. It would be a new doctrine indeed, to assert that a party only had standing in court whose claims were undisputed. If that rule were to prevail the labors of the courts would be very much lightened.

The real question is, then, whether an unliquidated claim, disputed or undisputed, is such a debt as may be made the foundation of involuntary bankruptcy proceedings.

Section 59b of the Act provides that three or more creditors who have provable claims against any person, etc., may file a petition. Section 63, under the caption "Debts which may be proved," specifies various classes of debts, among others, as follows:

"(4) Founded upon an open account or upon a contract, express or implied."

It will not be denied that the claim of W. M. Laird Co. is for a breach of an express contract of warranty.

Subsection b, of section 63, provides that unliquidated claims may be liquidated in such manner as the court shall direct and may thereafter be proved and allowed.

Our contention is that all claims of the classes specified in section 63a are "provable claims" within section 59b, whether liquidated or unliquidated, and that subsection b, of section 63, is intended merely to provide a way in which the amount of an unliquidated claim may be determined for the purpose of allowance.

The Act of 1867 also recognized that provable debts consisted of both liquidated and unliquidated claims. Section 19, entitled "of debts and proofs of claim," provided, "If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted or withheld, the court may cause such damages to be assessed in such mode as it may deem best and the sum so assessed may be proved against the estate."

Section 63b gives the Bankruptcy Court the power to direct the liquidation of unliquidated claims. In order to apply to the court for such a direction for liquidation, a claimant must go into court in some proceeding and that proceeding must be in the matter of the alleged bankruptcy of the debtor, so that the very proceeding contemplated by this section of the act is the filing of a petition against the debtor and then applying to the court for the liquidation of the claim, and then, if established, the adjudication of the debtor would follow. Otherwise, the Bankruptcy Act would defeat the very purpose for which it was passed.

The Act, section 3b, provides: "A petition may be filed against a person who is insolvent and who committed an act of bankruptcy, within four months after the commission of such act." If a creditor with an unliquidated claim could not file a petition against a debtor until his claim was liquidated, then a debtor could commit an act of bankruptcy and by getting extensions of time, and through appeals, and on account of the condition of the calendars of our state courts, succeed in preventing a creditor from having a just claim liquidated within four months after such act of bankruptcy and thus prevent the creditor from ever filing a petition. It is plain that it was the intent of section 63b, by giving the bankruptcy courts the power to liquidate claims, to prevent the four months provision from working injustice.

Since this brief was prepared the attention of Counsel has been called to the case of Crawford v. Burke, 195 U. S. 176, which seems to be decisive of the question here presented. Followed in Tindle v. Birkett, 183 N. Y. 267.

This is the view of the statutes taken by the Circuit Court of Appeals as expressed by the opinion of Judge Townsend, in the case at bar, in which he says:

"To hold, as is contended by the alleged bankrupt, that the claim is not provable because the amount of the claim itself is not determinable, or its validity is disputed, would defeat the purpose of the involuntary provisions of the Bankrupt Act." (12 Amer. Bankruptcy Reports, page 350).

Some help may be had by examining the question from another point of view. Section 17 provides that a discharge in bankruptcy shall release a bankrupt from all of his "provable debts" with certain exceptions not here material. If the claim of the petitioning creditor were one of the "provable debts" from which the alleged bankrupt would be discharged, then it follows that its claim, though unliquidated, is a "provable claim" within section 59b. In *In re Hilton*, 4 Am. Bkr. Rep. 774, Brown, District Judge, says: "The principal question presented on this motion is whether an unliquidated claim that might have been liquidated and proved against the bankrupt, but which was voluntarily withheld for more than fifteen months after adjudication and until the expiration of the period allowed for proving claims, should be treated as a "provable debt" under section 17, so as to be barred by the bankrupt's discharge and entitling the bankrupt to a stay on a pending suit thereon in the state court under section 11. In my judgment, it should be so treated."

The error of the argument of the counsel for the appellant lies in his failure to distinguish between the terms "provable claim," "proof of claim" and "allowance of claim." There is a clear distinction running through the entire Bankruptcy Act, and though the terms are sometimes used interchangeably, the distinction in meaning is always apparent. It is pointed out in *In re Hornstein*, 10 Am. Bkr. Rep. 308, at pages 317-321.

A provable claim is any claim within the classes specified in section 63a, liquidated or unliquidated, secured or unsecured.

A proof of claim is a deposition in a certain form showing the grounds of the claim, the amount thereof and containing certain other information in regard thereto. The act of proving a claim consists in verifying the proof of claim and filing it with the referee.

The allowance of a claim is the judicial determination of the validity and amount of a claim which has been proved.

In other words, a claim for unliquidated damages is a provable claim, although the creditor may not until the damages have been

liquidated as directed by the Bankruptcy Court, either make a deposition as to its amount or procure its allowance.

The theory of the Bankruptcy Law is, that all creditors shall share alike in the distribution of the assets. The only method of proceeding to such distribution is to ascertain the creditors and the amount due to each. Right here the law wisely says that a man who has received a preference shall not be considered a creditor unless he restore to the assets what he has received by way of preference. Any other rule would give to such preferred creditor a distinct advantage over others which violates the very spirit of the Act. Also for the same reason a mere endorser upon a promissory note of the bankrupt is not a creditor until his liability becomes fixed, as held in Phillips vs. Dreher Shoe Co., 7 Am. Bankruptcy Reports, 326, cited on the brief of the appellant.

Section 636 provides that *unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct.* If a man were insolvent and had committed an act of bankruptcy and all his creditors had just and valid claims, but unliquidated, upon the theory of the learned counsel for the appellant the court would be powerless to proceed under section 63b to direct liquidation, and after such liquidation to adjudicate him a bankrupt. We submit that no reasonable construction of the act of 1898 would permit such manifest injustice. If the act gives to the court jurisdiction to liquidate the claim it must necessarily acquire jurisdiction by a petition and subpoena, and having thus liquidated the claim, it follows as part of the initial proceedings that an adjudication will follow, of course, if the man be both insolvent and has committed an act in bankruptcy.

The judgment appealed from should be affirmed, with costs.

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Supreme Court of the United States.

No. 63.—October Term, 1906.

Frederic L. Grant Shoe Company, Appellant, *vs.* W. M. Laird Company. } Appeal from the District Court of the United States for the Western District of New York.

[December 17, 1906.]

In July, 1903, the W. M. Laird Company of Pittsburg, Pennsylvania, commenced proceedings in the District Court of the United States for the Western District of New York to cause the Frederick L. Grant Shoe Company, a corporation doing business in Rochester, New York, to be adjudicated involuntary bankrupts. The petition was solely made by the Laird Company, it averring, among other things, that the shoe company had less than twelve creditors, and that the petitioner was a creditor and had provable unsecured claims against the shoe company amounting in the aggregate to more than five hundred dollars. The nature of the claim was detailed at length, and showed that it was one for unliquidated damages aggregating $3,732.80, asserted to have been suffered by reason of breaches of an alleged express warranty in the sale of merchandise. The alleged bankrupt answered, denying its insolvency and the commission of any of the acts of bankruptcy averred in the petition, and demanded a trial by jury of the said issues. It also denied being indebted in any amount to the petitioner.

Soon afterwards a motion was made to dismiss the petition on the ground that, because of the nature of the claim held by the Laird Company, that company was not a creditor and the holder of a provable claim for any amount against the shoe company within the meaning of subdivision *b* of section 19 of the bankruptcy act, and consequently was not entitled to file a petition in bankruptcy against the alleged debtor. The motion to dismiss was denied by the district judge. (125 Fed. Rep. 576.) In the order entered it was directed that the claim of the petitioner be liquidated by the jury at the jury trial demanded by the alleged bankrupt for the determination of the issues as to insolvency and the commission of acts of bankruptcy. On the petition of the alleged bankrupt to review this order it was affirmed by the Circuit Court of Appeals for the Second Circuit. (130 Fed. Rep. 881.)

A trial of the issues thus raised was had before a jury in May, 1905, and, as recited in the record, "at the close of all the evidence the court

having directed the jury to find a verdict that the said alleged bankrupt did, within four months of the filing of the petition herein, commit an act of bankruptcy, in that it transferred a portion of its property to the German-American Bank of Rochester, one of its creditors, with the intent to prefer said German-American Bank over its other creditors, and that at the time of said transfer said alleged bankrupt was insolvent, and that the petitioner has a provable claim against said alleged bankrupt for damages for the breach of warranty in the sale of shoes, and that the amount of such claim of the petitioner is the sum of $3,454.00, the jury found a verdict accordingly." An order was thereupon entered adjudicating the shoe company a bankrupt, and declaring that the claim of the Laird Company was liquidated at the sum of $3,454.00. The present appeal was then taken.

For the purpose of the appeal, and reciting that it was pursuant to the requirements of General Order in Bankruptcy No. 36, the trial judge made and filed findings of fact and conclusions of law. A single question of jurisdiction was also certified as having been raised at the opening of the hearing in September, 1905, by motion to dismiss, substantially upon the grounds urged in the previous motion to dismiss, which had been passed upon by the Court of Appeals.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

Without considering whether the shoe company, appellant in this court, is not concluded by the decision of the Circuit Court of Appeals upon the petition asking a review of the order of the District Court in bankruptcy, denying the original motion to dismiss, we do not pass upon the question presented by this appeal, as we find we are, without authority to do so. (*Elliott* v. *Toeppner*, 187 U. S. 327.) In the cited case, answering a question certified from the United States Circuit Court of Appeals for the Sixth Circuit, it was held that a judgment that a person is not a bankrupt, entered by a court of bankruptcy on a verdict of not guilty in a trial by jury, demanded as of right under section 19 of the bankruptcy act, was reviewable only by writ of error. Section 25*a* of the bankruptcy act, which authorizes appeals, as in equity cases, to be taken to the Circuit Court of Appeals, among other cases, from a judgment adjudging or refusing to adjudge the defendant a bankrupt, was expressly considered, and it was held that the provision only applied to judgments adjudging or refusing to adjudge the defendant a bankrupt, "when a trial by jury had not been demanded, and where the court of bankruptcy proceeded on its own findings of fact." The reasoning upon which the decision was based was in substance that as in the character of proceeding under considera-

tion the right to a trial by jury was absolute, such a trial was a trial according to the course of the common law, and judgments therein rendered are revisable only on writ of error. (p. 332.) As in the case at bar a jury was demanded, the trial was before such jury, and their verdict determined the questions at issue, it follows that the record should have been brought to this court by writ of error and not by appeal.

Appeal dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.